



# PUBLIC NOTICE

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## MEDIA BUREAU SEEKS COMMENT ON THE REGIONAL SPORTS NETWORK MARKETPLACE MB Docket No. 11-128

**Comment Date: September 9, 2011**

**Reply Comment Date: September 26, 2011**

By this Public Notice, the Media Bureau seeks comment on issues related to regional sports network (“RSN”) access and carriage in order to prepare a report as provided in the *Adelphia Order*. In July 2006, the Commission approved the purchase of Adelphia Communications Corporation’s cable systems by Time Warner Cable Inc. (“TWC”) and Comcast Corporation (“Comcast”) (collectively, the “Applicants”) subject to several conditions, including RSN access and carriage requirements.<sup>1</sup> In particular, the *Adelphia Order* adopted program access conditions preventing the Applicants from entering into any exclusive distribution agreements with existing and future affiliated RSNs and unduly or improperly influencing the sale of the programming of those RSNs to unaffiliated multichannel video programming distributors (“MVPDs”).<sup>2</sup> The Applicants were also required to provide the programming of affiliated RSNs to all MVPDs pursuant to non-discriminatory terms and conditions.<sup>3</sup> Moreover, in the *Adelphia Order*, the Commission applied the program access rules applicable to satellite-delivered, cable-

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<sup>1</sup> See *Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corp., Assignors to Time Warner Cable, Inc., Assignees, et al.*, Memorandum Opinion and Order, 21 FCC Rcd 8203, 8836-39, Appendix B (2006) (“*Adelphia Order*”).

<sup>2</sup> See *id.* at 8336, Appendix B (“Comcast and Time Warner will not enter into an exclusive distribution arrangement with any such Covered RSN, regardless of the means of delivery; Neither Comcast nor Time Warner (including any entity with which it is affiliated) shall unduly or improperly influence (i) the decision of any Covered RSN, regardless of the means of delivery, to sell programming to an unaffiliated MVPD; or (ii) the prices, terms, and conditions of sale of programming by a Covered RSN, regardless of the means of delivery, to an unaffiliated MVPD.”). In the *Adelphia Order*, a “Covered RSN” is defined as “an RSN (i) that Comcast or Time Warner currently manages or controls, or (ii) in which Comcast or Time Warner, on or after the date of adoption of this Order and during the period of the conditions, acquires either an attributable interest, an option to purchase an attributable interest, or one that would permit management or control of the RSN.” *Id.* at 8274, ¶ 156 n.525.

<sup>3</sup> See *id.* at 8336, Appendix B (“Comcast, Time Warner, and their existing or future Covered RSNs, regardless of the means of delivery, shall not offer any such RSN on an exclusive basis to any MVPD, and Comcast, Time Warner, and their Covered RSNs, regardless of the means of delivery, are required to make such RSNs available to all MVPDs on a non-exclusive basis and on nondiscriminatory terms and conditions.”). The Commission also explained that if its program access rules were modified that the *Adelphia* conditions would conform to the revised rules. See *id.* (“These exclusive contracts and practices, non-discrimination, and undue or improper influence requirements of the program access rules will apply to Comcast, Time Warner, and their Covered RSNs for six years, provided that if the program access rules are modified this condition shall be modified to conform to any revised rules adopted by the Commission.”).

affiliated programming to all of the Applicants' affiliated RSNs, regardless of the method of delivery.<sup>4</sup> However, the Commission partially exempted Comcast's SportsNet Philadelphia from these requirements given that it was delivered terrestrially before being acquired by Comcast, and therefore the method of delivery was not chosen for anticompetitive purposes.<sup>5</sup> Finally, the Commission implemented a dispute resolution process allowing aggrieved MVPDs and unaffiliated RSNs respectively to submit program access or carriage disputes with the Applicants to an arbitrator.<sup>6</sup>

The *Adelphia Order* committed the Commission to issue a report examining "regional sports network access and carriage issues both on an industry-wide basis and specifically with respect to the Applicants" by January 13, 2012, six months prior to the expiration of the RSN conditions.<sup>7</sup> After issuing the report, the Commission, in its discretion, may determine if further action is warranted.<sup>8</sup>

We note that since the *Adelphia Order* was adopted, there have been a number of relevant marketplace and regulatory developments. First, Time Warner Inc., the former parent of TWC, has been split into three separate, independent companies – TWC, Time Warner Inc., and AOL.<sup>9</sup> The RSNs subject to the *Adelphia* conditions remain affiliated with TWC.<sup>10</sup>

Second, the Commission adopted the *Comcast-NBCU Order*, approving the merger of Comcast and NBC Universal, Inc ("NBCU").<sup>11</sup> In that order, the Commission concluded that commenters raised legitimate concerns regarding the combination of Comcast's RSNs with NBCU's owned and operated

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<sup>4</sup> See *id.* at 8274, ¶ 156.

<sup>5</sup> See *id.* at 8276, ¶ 163. However, in the *Adelphia Order*, the Commission clarified that the program access conditions would apply to those MVPDs that had a license agreement for Comcast's SportsNet Philadelphia pre-merger. See *id.* In addition, Comcast's SportsNet Philadelphia is now subject to the complaint process implemented in the *Terrestrial Program Access Order*, and any MVPD that seeks access to Comcast SportsNet Philadelphia may file a complaint pursuant to the procedures established in the rule. See *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, First Report and Order, 25 FCC Rcd 746, 792-93, ¶¶ 69-70 (2010) ("*Terrestrial Program Access Order*"), affirmed in part and vacated in part sub. nom. *Cablevision Systems Corp. et al. v. FCC*, No. 10-1062 *et al.*, \_\_\_ F.3d \_\_\_ (D.C. Cir. June 10, 2011), 2011 WL 2277217 (C.A.D.C.).

<sup>6</sup> See *Adelphia Order*, 21 FCC Rcd at 8274, 8287-88, ¶¶ 156, 190. However, the Commission later suspended the program carriage arbitration condition in light of the anticipated revision to the program carriage procedures. See *Comcast Corporation Petition for Declaratory Ruling that The America Channel is not a Regional Sports Network*, Order, 22 FCC Rcd 17938, 17938-39, 17946-47, ¶¶ 1, 24 (2007) ("*TAC Order*"); see also *Development of Competition and Diversity in Video Programming Distribution and Carriage*, Notice of Proposed Rulemaking, 22 FCC Rcd 11222, 11226-28, ¶¶ 12-19 (2007) ("*Program Carriage NPRM*").

<sup>7</sup> *Adelphia Order*, 21 FCC Rcd at 8277, ¶ 165.

<sup>8</sup> See *id.*

<sup>9</sup> See Letter from Paul T. Cappuccio, Executive Vice President and General Counsel, Time Warner Inc., to Marlene H. Dortch, Secretary, FCC, CS Docket No. 00-30, at 2 (Jan. 6, 2010); see also *Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Time Warner Inc., and its Subsidiaries, Assignor/Transferor to Time Warner Cable, Inc., and its Subsidiaries, Assignee/Transferee*, Memorandum Opinion and Order, 24 FCC Rcd 879 (MB, 2009) ("*TWC Separation Order*").

<sup>10</sup> See *TWC Separation Order*, 24 FCC Rcd at 883, 893, ¶¶ 8, 26 n.112 (indicating that TWC would continue to own its RSNs after separating from Time Warner and remain subject to the *Adelphia Order*'s program access conditions); see also Time Warner Inc., *Time Warner Inc.-Time Warner Cable Separation Information*, <http://ir.timewarner.com/phoenix.zhtml?c=70972&p=irol-twcseparation> (visited July 21, 2011).

<sup>11</sup> See *Applications of Comcast Corp., General Electric Co. and NBC Universal, Inc.*, Memorandum Opinion and Order, 26 FCC Rcd 4238 (2011) ("*Comcast-NBCU Order*").

stations. The Commission found, however, that any potential harm was mitigated by certain program access conditions to which Comcast agreed to be bound.<sup>12</sup> In addition, the Commission adopted an arbitration remedy applicable to all Comcast-NBCU affiliated programming, including RSNs.<sup>13</sup>

Further, the Commission issued a program access order in 2007, which among other things, improved the program access complaint procedures by allowing for party-to-party discovery and expanding opportunities for participation in voluntary arbitration.<sup>14</sup>

With respect to program carriage, in 2007, the Commission issued a notice of proposed rulemaking that sought comment on, among other things, the Commission's process for resolving program carriage disputes.<sup>15</sup> Moreover, since the Adelphia transaction, the Commission has specifically addressed program carriage complaints regarding the Applicants' and unaffiliated RSNs.<sup>16</sup>

In 2010, the Commission adopted rules allowing aggrieved MVPDs to file a complaint regarding access to terrestrially delivered, cable-affiliated programming.<sup>17</sup> This decision was particularly relevant to the RSN marketplace, because several RSNs are delivered terrestrially and the Commission has historically classified this type of programming as "must-have."<sup>18</sup> Additionally, in the *Terrestrial Program Access Order*, the Commission adopted a rebuttable presumption that an unfair act involving terrestrially delivered RSNs or high-definition RSNs has the purpose and effect of hindering or preventing competition in violation of Section 628(b) of the Act.<sup>19</sup> In *Cablevision Systems Corp. v. FCC*, the D.C. Circuit upheld the portions of the Commission's order adopting rules regarding terrestrially delivered programming and the Commission's adoption of a rebuttable presumption involving RSNs.<sup>20</sup>

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<sup>12</sup> See *id.* at 4295, ¶ 138.

<sup>13</sup> See *id.* at 4364-70, Appendix A.

<sup>14</sup> See *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, Report and Order and Notice of Proposed Rulemaking, 22 FCC Rcd 17791, 17847-59, ¶¶ 83-113 (2007).

<sup>15</sup> See *Program Carriage NPRM*. This rulemaking remains pending.

<sup>16</sup> In 2007, the Commission issued an order finding that The America Channel ("TAC") was an RSN as defined in the *Adelphia Order* and requiring Comcast to participate in arbitration to resolve its carriage dispute with TAC. See *TAC Order*, 22 FCC Rcd at 17938-39, ¶ 1. However, as previously noted, the program carriage arbitration condition has been suspended. See *supra* note 6. In 2008, the Media Bureau ("Bureau") upheld an arbitrator's decision to award Mid-Atlantic Sports Network ("MASN") carriage on TWC's North Carolina cable systems. See *TCR Sports Broadcasting Holding, L.L.P. d/b/a Mid-Atlantic Sports Network v. Time Warner Cable Inc.*, Order on Review, 23 FCC Rcd 15783 (MB 2008). In 2010, the Commission reversed the Bureau's order after concluding that TWC had valid and non-discriminatory reasons for deciding not to carry MASN on its North Carolina cable systems. See *TCR Sports Broadcasting Holding, L.L.P. d/b/a Mid-Atlantic Sports Network v. Time Warner Cable Inc.*, Memorandum Opinion and Order, 25 FCC Rcd 18099 (2010). This decision is currently on appeal in the Fourth Circuit. See *TCR Sports Broadcasting Holding, LLP v. FCC*, No. 11-1151 (4th Cir.).

<sup>17</sup> See *Terrestrial Program Access Order*.

<sup>18</sup> See *id.* at 782-83, ¶ 52.

<sup>19</sup> See *id.* at 782-83, 785, ¶¶ 52, 55.

<sup>20</sup> See *Cablevision*, No. 10-1062 *et al.* In its decision, the Court remanded one non-RSN specific issue to the Commission.

### **Issues for Comment**

We seek comment generally on issues related to RSN access and carriage.<sup>21</sup> What effect, if any, have marketplace and the 2007 and 2010 program access rules revisions had on MVPDs' ability to gain access to RSN programming? Similarly, what impact have regulatory and marketplace changes since the *Adelphia Order* had on the ability of unaffiliated RSNs to gain carriage on MVPD systems? Since the release of the *Adelphia Order* has there been an increase in the delivery of RSNs by terrestrial means? In addition, has the number of RSNs affiliated with a cable operator changed since the release of the *Adelphia Order*? If there has been a change, how does this number compare with the overall number of RSNs in the marketplace? Are there examples since the release of the *Adelphia Order* involving the withholding of an RSN and what impact has this had on the MVPD marketplace? Further, has there been a change in the number of exclusive deals involving MVPDs and unaffiliated RSNs since the release of the *Adelphia Order*?

Moreover, we seek comment on the access of MVPDs, other than the Applicants, to RSN programming in which the Applicants hold an interest. We also request comment on whether unaffiliated RSNs have obtained carriage on the Applicants' cable systems and on what terms. Finally, we seek comment on the Applicants' compliance with the *Adelphia Order*'s RSN conditions, the dispute resolution process and the effectiveness of these remedies. Do such conditions continue to be necessary in light of marketplace and regulatory changes since the time of their adoption?

### **Procedural Matters**

The proceeding this Notice initiates shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules.<sup>22</sup> Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the

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<sup>21</sup> See *Adelphia Order*, 21 FCC Rcd at 8277, ¶ 165. In the *Adelphia Order*, the Commission defined an RSN as "any non-broadcast video programming service that (1) provides live or same-day distribution within a limited geographic region of sporting events of a sports team that is a member of Major League Baseball, the National Basketball Association, the National Football League, the National Hockey League, NASCAR, NCAA Division I Football, NCAA Division I Basketball and (2) in any year, carries a minimum of either 100 hours of programming that meets the criteria of subheading 1, or 10% of the regular season games of at least one sports team that meets the criteria of subheading 1." *Id.* at 8336, Appendix B. The Commission adopted a similar definition in its *Comcast-NBCU Order*. See *Comcast-NBCU Order*, 26 FCC Rcd at 4358, Appendix A. However, in the *Liberty/DIRECTV Order*, the Commission expanded the definition of an RSN to include sports programming that was likely to be highly valued by residents of Puerto Rico given that the applicants offered MVPD service there. Accordingly, the Commission added Liga de Béisbol Profesional de Puerto Rico, Baloncesto Superior Nacional de Puerto Rico, Liga Mayor de Fútbol Nacional de Puerto Rico, and the Puerto Rico Islanders of the United Soccer Leagues First Division to the list of sports leagues in the RSN definition. See *News Corp. and the DIRECTV Group, Inc., Transferors and Liberty Media Corp., Transferee for Authority to Transfer Control*, Memorandum Opinion and Order, 23 FCC Rcd 3265, 3308-3309, ¶¶ 94-95 (2008) ("*Liberty/DIRECTV Order*"). The Commission also adopted this definition, as it was modified in the *Liberty/DIRECTV Order*, when it revised the program access complaint procedures. See *Terrestrial Program Access Order*, 25 FCC Rcd at 783-84, ¶ 53.

<sup>22</sup> 47 C.F.R. §§ 1.1200 *et seq.*

presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (e.g., .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS). See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <http://fjallfoss.fcc.gov/ecfs2/>.
- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12<sup>th</sup> St., SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12<sup>th</sup> Street, SW, Washington DC 20554.

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